IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95,

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN,

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Filer:
Brian O'Connell, as Personal Representative of the Estate of
Simon L. Bernstein, Intervenor.

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant
and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

BRIAN M. O'CONNELL, as Personal Representative of the Estate of Simon L. Bernstein,

Intervenor.

INTERVENOR'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOW COMES Intervenor, Brian M. O'Connell, Personal Representative of the Estate of Simon L. Bernstein ("Intervenor"), and for his Response in Opposition to Plaintiffs' Motion for Summary Judgment, states as follows:

INTRODUCTION

Plaintiffs have moved for summary judgment only on Counts I and II of their three count complaint. Count I is moot because the defendant against whom that Count is brought has been dismissed. Plaintiffs have not moved for summary judgment on Count III which seeks the declaration of the resulting trust as alternative relief to that is sought in Count II. As a consequence, only Count II is effectively before the court. The only issues raised by Plaintiffs' Motion as to Count II are whether they have demonstrated as a matter of law, notwithstanding their inability to locate an executed trust document, that Simon Bernstein executed a written trust and that, as a matter of law, the terms of that trust are as depicted on the unsigned drafts they have presented as Plaintiffs' Exhibits 15 and 16. Plaintiffs' Motion fails to do either of those things for the following reasons:

1. The burden of proof applicable to Count II is an enhanced "clear and convincing" standard which Plaintiffs do not even acknowledge, no less demonstrate they have satisfied *as a matter of law*.

2. The essential material facts upon which their Motion relies to establish that Simon Bernstein executed a trust document are offered through the testimony of David Simon and Ted Bernstein who are "interested parties" as that term is used under the Illinois Dead Man's Act. Their testimony is therefore inadmissible in these proceedings.

3. Even if the testimony of David Simon and Ted Bernstein were admissible on the issue of the execution of the trust, the circumstantial and direct evidence presented herein controverts their testimony as to both the creation and terms of the trust.

As a consequence, Plaintiffs' Motion for Summary Judgment must be denied.

LEGAL STANDARD FOR SUMMARY JUDGMENT

A court deciding a motion for summary judgment must view all evidence in the light most favorable to the party opposing the motion for summary judgment." *Santiago v. Lane*, 894 F.2d 218, 221 (7th Cir. 1990). A genuine dispute as to any material fact exists if "the evidence is

such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party has the initial burden of establishing that there is no genuine dispute as to a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-movant "need only come forward with appropriate evidence demonstrating that there is a pending dispute of material fact." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921 (7th Cir. 1994). Under these standards, Plaintiffs have failed to demonstrate the absence of a disputed issue of material fact and their Motion must be denied.

ARGUMENT

I. Count I is Moot Because Heritage has been Dismissed.

Plaintiffs seek summary judgment on Counts I and II of their Amended Complaint. (Dkt. No. 73) However, Count I is a breach of contract claim against Heritage Union Life Insurance Company that interpleaded the proceeds of an insurance policy and was dismissed from the case. (Dkt. No. 101) Plaintiffs provide no authority for the proposition that they may obtain a judgment against a party who is no longer a defendant. Summary judgment must be denied on Count I, which is moot.

Plaintiffs have not moved for summary judgment on Count III of the Amended Complaint, which seeks the declaration of a resulting trust as alternative relief to that sought in Count II. Therefore, the only substantive issue raised by Plaintiffs' Motion is whether they have shown under Count II that as a matter of law, Simon Bernstein executed a written trust and that its terms were those reflected in Plaintiffs' Exhibits 15 and 16. They have failed to do that.

II. The Burden of Proof Applicable to Plaintiffs' Claim is an enhanced "Clear and Convincing" Standard.

Count II seeks a declaration that Simon Bernstein executed a written trust with terms reflected in the unsigned documents attached as Exhibits 15 and 16 to their Motion. Plaintiffs

seek to prove the execution of the trust document principally by the testimony of David Simon and Ted Bernstein. To prevail on their claim through this parol evidence, "the oral evidence must, to establish the execution of a lost instrument, be clear and strong, satisfactory and convincing." *Stowell v. Satorius*, 413 Ill. 482 (1952). Following *Stowell*, in *Jones v. Royal Builders of Bloomington Normal, Inc.*, 39 Ill. App. 3d 489 (4th Dist. 1976), the plaintiff sought to prove the existence of a trust agreement and, failing that, sought to prove the existence of a resulting trust. The court there described the applicable burden of proof as follows:

> The proof necessary to establish the existence of a trust by parol evidence has been phrased in various ways: The proof must be 'clear and convincing' (*Williams v. Anderson*, 288 Ill. App. 149, 5 N.E. 2d 593); 'unequivocal and unmistakable' (*Reynolds v. First National Bank*, 279 Ill. App. 581); even so strong, unequivocal and unmistakable as to lead to but one conclusion. (*Maley v. Burns*, 6 Ill. 2d 11, 126 N.E.2d 695). A similar high degree of proof is necessary to establish the terms of the trust, such as the identity of the beneficiaries, and the nature and extent of their interests. *Maley v. Burns*.

39 Ill. App. 3d at 492. Here, Plaintiffs have failed even to acknowledge the applicability of this burden, and have made no effort to establish that the evidence they present satisfies this burden *as a matter of law*. This is particularly significant here because, as shown below and in Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts, the evidence upon which Plaintiffs rely in support of their Motion is based entirely on the credibility of two interested witnesses, Ted Bernstein and David Simon, and credibility determinations are the sole province of the trier of fact. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000) ("the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence), *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554–555, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The importance of this Rule

would appear even more acute where the burden of proof is as stringent as that applicable to proof of a trust where the trust document is lost.

As shown below, the circumstantial and direct evidence creates a question of fact as to material issues, particularly regarding Simon Bernstein's purported execution of a trust. It demonstrates that the credibility of these key witnesses must be weighed by the trier of fact having the opportunity to view their manner of testifying and considering their bias, interest, etc. Plaintiffs have not provided a basis to declare these factual issues resolved as a matter of law by the "clear and convincing" standard.

III. The Evidence Plaintiffs Present Does Not Demonstrate the Absence of a Disputed Issue of Material Fact

A. David Simon and Ted Bernstein are "interested parties" under the Illinois Dead Man's Act.

Plaintiffs' Motion must be denied because it relies upon the deposition and affidavit testimony of David Simon and Ted Bernstein for the key facts underlying the Motion. But their testimony may not be considered because it is inadmissible under the Illinois Dead Man's Act ("DMA"). The relevant portion of the DMA states as follows:

> In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability...

735 ILCS 5/8-201. None of the enumerated exceptions to the application of the DMA apply here. The DMA is an evidentiary rule barring testimony by someone with an interest in litigation about any conversation with or event occurring in the presence of a decedent. *Gunn v Sobucki*, 216 Ill. 2d 602, 837 N.E. 2d 865 (2005) (upheld DMA); *Brown, Udell and Pomerantz, Ltd. v Ryan*, 369

Ill. App. 3d 821, 861 N.E. 2d 258 (1st D 2006). The rationale for the rule is that because a decedent's lips are sealed by death, a survivor's lips will be silenced by law. *See* 98 C.J.S. Witnesses § 209. The DMA applies to summary judgment proceedings and in federal diversity cases where state law supplies the rule of decision. *Ball v. Kotter,* 2012 WL 987223 (U.S. Dist. Ct. N. D. Ill.), citing *Brown, Udell and Pomerantz, Ltd v Ryan,* 369 Ill. App. 3d 821, 861 N.E.2d 258 (1st D 2006); *Lovejoy Electronics, Inc. v. O'Berto,* 873 F.2d 1001, 1007 (7th Cir. 1989). The parties agree that Illinois law supplies the rules of decision here. (Dkt. No. 151, p. 9) The DMA will prohibit the testimony of an adverse or directly interested party from testifying on his or her own behalf.

In determining whether a party is "adverse," Illinois courts look to the actual interests of the party, not to his or her formal designation. *Ball v. Kotter* 2012 WL 987223 at *7. "A non-party witness's testimony may also be barred under the DMA if that person is deemed 'directly interested in the action.' To disqualify a witness as 'directly interested in the action,' the witness's 'interest in the judgment must be such that a pecuniary gain or loss will come to the witness directly as the immediate result of the judgment.'" *Id.* at *8, citing *Michalski v. Chicago Title & Trust Co.,* 50 Ill.App.3d 335 (3d Dist. 1977). The testimony of an interested party's spouse is also barred pursuant to the Dead Man's Act. *In re Estate of Babcock,* 105 Ill. 2d 267, 271, 473 N.E. 2d 1316 (Ill. 1985).

David Simon and Ted Bernstein are "interested parties" under the DMA. It is undisputed that if summary judgment is entered in favor of the Plaintiffs, each of them will receive 20% of the interpleaded funds. (*See* Intervenor's SOF, ¶¶ 1-4) Each plaintiff is therefore, by definition, an interested party under the Dead Man's Act. In addition, Plaintiffs' most critical witness is David Simon, who is not a Plaintiff, but is the spouse of Pam Simon who is a Plaintiff. Because

his wife will receive over $300,000 if Plaintiffs prevail, he also is an interested party under the DMA. (*Babcock, supra*; Intervenor's SOF, ¶ 3)

B. The Dead Man's Act Bars the essential testimony underlying Plaintiffs' Motion for Summary Judgment.

The testimony of every Plaintiff, and of David Simon, regarding what Simon Bernstein said or did in their presence is barred by the DMA. Paragraphs 23 through 27 of the Affidavit of David Simon (Plaintiffs' Exhibit 32) set forth the facts upon which the Plaintiffs rely in asserting that Plaintiffs' Exhibits 15 and 16 represent facsimiles of a written trust executed by Simon Bernstein. Without this testimony, Plaintiffs have no basis to claim that Exhibits 15 and 16 represent the terms of the trust that Mr. Bernstein purportedly executed and they have no evidence upon which a trier of fact could find that Mr. Bernstein executed anything, no less a document with terms identical to those in Exhibits 15 and 16. However, these paragraphs are based entirely upon Mr. Simon's description of conversations he had with Simon Bernstein and things that occurred in Mr. Bernstein's presence with respect to the creation of the trusts. All of this testimony is therefore barred by the DMA.[1]

In Paragraph 23 of Plaintiffs' Exhibit 32, Mr. Simon avers that he and his wife had used Hopkins & Sutter to create trusts for themselves. In Paragraph 24, he describes how Simon Bernstein told him essentially that he wanted to do the same thing David and his wife had done. Paragraph 25 describes David Simon creating a sample insurance trust for Simon Bernstein and reviewing it with him. It further describes conversations in which they agreed Simon Bernstein would use Hopkins & Sutter to finalize and execute the insurance trust, where they discussed the purpose of the insurance trust, who would be a trustee, and Mr. Simon's suggestion to Mr. Bernstein that Ted Bernstein act as the "next trustee." Paragraph 26 describes Simon Bernstein

[1] Ted Bernstein's testimony that his father told him he was to be the trustee of a trust (*See* Intervenor's Exhibit A, pp)is also barred by the DMA.

taking a copy of the draft trust and going to Hopkins & Sutter to execute it.[2] David Simon never witnessed Simon Bernstein modify or execute the purported Trust document. (*See* Intervenor's Exhibit B, pp. 36:12 – 39:8; 39:17 – 40:16; 41:14 – 43:9). According to David Simon's testimony, Simon Bernstein left the Simon Law Firm with an unsigned draft of a document and returned with a signed document, which was not copied, scanned or otherwise saved in the files of the Simon Law Firm or Hopkins & Sutter. (*See* Intervenor's Exhibit B, pp. 44:3 - 45:13). In Paragraph 27, David Simon then avers that he met again with Simon Bernstein and reviewed the executed Bernstein Trust Agreement and that he assisted him with preparing certain other forms.

All of this testimony, including his allegedly viewing the executed Trust, occurred in the presence of Simon Bernstein, in the midst of conversations with Simon Bernstein, and is therefore barred by the Illinois Dead Man's Act. The testimony contained in these paragraphs is all the evidence Plaintiffs have to rely upon for the notion that Mr. Bernstein executed a trust document and that its terms are those contained in Plaintiffs' Exhibits 15 and 16. Because this testimony is inadmissible under the DMA, Plaintiffs' Motion as to Count II must be denied.

C. Even if Admissible, David Simon's Testimony is Heavily Controverted

i. The results and timing of the two document searches raise doubt.

Even if David Simon's testimony were admissible, it could only be accepted if deemed credible by the trier of fact. Multiple facts controvert his testimony and/or undermine his credibility. For example, in his Affidavit, Mr. Simon states in paragraph 28 that he conducted a search of his office and records in Chicago and located a hard copy draft of the Simon Bernstein

[2] Foley & Lardner, the successor firm to Hopkins & Sutter, was contacted to see if the firm retained a copy of the 1995 Trust; but David Simon could not recall who contacted the law firm, which attorneys were contacted, or even if he or someone on his behalf made the effort to contact the law firm. (*See* Intervenor's Exhibit B, pp. 44:12 – 45:15; 46:22 – 47:15). There has been no evidence cited to explain why he needed to go to Hopkins & Sutter to "execute the document" when David Simon appears to be saying that he prepared the document.

Trust. (*See* Plaintiffs' Exhibit 32 at ¶ 28; Ex. 16) In paragraph 29, he states that, with the help of his brother Adam, he located a copy of the Trust (Plaintiffs' Exhibit 15) that had been prepared on his word processor. (*Id.* at ¶ 29) Those two exhibits are presented to this Court as facsimiles of the Trust that they claim Simon Bernstein actually executed. However, the circumstances and timing of the discovery of these documents would allow a trier of fact to doubt their authenticity. That is because Mr. Simon's Affidavit omits the fact that the search he performed which resulted in the discovery of the documents occurred one year after Simon Bernstein died. (*See* Plaintiffs' Exhibit 15; Plaintiffs' Exhibit 32 at ¶¶ 28-29) Almost a year earlier, the family had conducted what was described as a "exhaustive search" for the Trust, and none was found. (*See* Intervenor's Exhibit A, p. 55:1-11 and Dep. Ex. 3)

Between the two searches, the Bernstein siblings and their attorney, Robert Spallina, exchanged many emails addressing how best to extract the insurance proceeds from Heritage. (*See* Intervenor's Exhibit A, Dep. Exs. 1-5; 8-18) Many of those emails refer to the inability to locate the trust document. (*See* Intervenor's Exhibit A, Dep. Exs. 4, 7-11) David Simon was a participant in those email exchanges and yet in none of them did he relate a recollection of what a jury might consider to be critical events described in Paragraphs 23 through 27 of his Affidavit. None of those emails apparently rang a bell with him that he might want to check his word processor and his files to see whether Plantiffs' Exhibits 15 and 16 still existed. That occurred only after the Simon Law Firm was retained as counsel and he and his brother undertook their second search in September, 2013.

ii. The 2000 Trust claims the proceeds of the Heritage Policy.

In addition, as the siblings addressed the lack of an executed document in their email exchanges, they considered several options for attempting to obtain the money from the

insurance company. One of the options was to employ a trust that Simon Bernstein admittedly executed which is called the "2000 Trust." (*See* Intervenor's Exhibit A, p. 37:4-18; pp. 48:21 – 49:19; Dep. Ex. 1) But that option was rejected because the 2000 Trust did not include Pam Simon as a beneficiary. (*Id.*) The existence of the 2000 Trust is critical, however, because it identifies the proceeds of the insurance policy at issue here as an asset of that Trust (*See* Intervenor's Exhibit A, Dep. Ex. 23 at Schedule A) while it does not refer to the existence of an alleged 1995 trust, which it would have superseded. (After all, the same proceeds cannot pass to two different trusts). A trier of fact might conclude that Simon Bernstein executed the 2000 Trust, omitting any reference to a 1995 trust, because the 1995 trust was never actually executed. Maybe he planned to do it and never did. There is no other clear explanation for it. In any event, Plaintiffs' Motion papers do not resolve the question as a matter of law by the "clear and convincing" standard.[3]

iii. The original complaint in this case omits reference to a written trust.

The pleadings in the original complaint here are also inconsistent with David's current recollection. Mr. Spallina apparently engaged in discussions with Heritage to plan for the company to interplead the funds into court in Florida. (*See* Intervenor's Exhibit A, Dep. Ex. 16) However, at that point David Simon and his brother Adam Simon, the attorney currently representing Plaintiffs in this case, abruptly filed a lawsuit in Circuit Court of Cook County on April 15, 2014 seeking to obtain the funds from Heritage. (*Id.*; Dkt. No. 1) This act resulted in a breach with Mr. Spallina, including a very angry exchange of emails and Spallina's ultimate withdrawal as counsel (*See* Intervenor's Exhibit A, Dep. Exs. 16 and 17). The complaint filed by

[3] It is also notable that no subsequent estate planning document executed by Simon Bernstein revokes, or even refers to the existence of, a purported 1995 Trust. (*See* 2000 Trust, Intervenor's Exhibit A at Dep. Ex. 23; 2008 Trust, Intervenor's Exhibit A at Dep. Ex.25; 2012 Trust, Intervenor's Exhibit A at Dep. Ex. 24).

the Simon Law Firm undermines Plaintiffs' position here because, despite David Simon's averment that he recalls having created the trust on his computer and having seen it after execution, the Complaint filed by Adam Simon on behalf of David Simon's wife and her siblings makes no reference whatsoever to the execution of a written trust. It refers only to the existence of a "common law trust." (Dkt. No. 1) It was only later, in September 2013, that David and Adam purportedly found Plaintiffs' Exhibits 15 and 16.

iv. The events surrounding the purported execution of the trust raise doubt.

David Simon avers in his Affidavit that Simon Bernstein took his draft trust document to the firm of Hopkins & Sutter where the execution purportedly occurred. (*See* Plaintiffs' Exhibit 32 at ¶¶ 23-27) He also testified that the identity of the successor trustee had been changed on the final document (*See* Intervenor's Exhibit B, pp. 40:2 - 43:4) The clear implication would have to be that word processing revisions occurred at Hopkins & Sutter as part of the trust being executed. However, David Simon also testified that Foley & Lardner, the successor firm to Hopkins & Sutter, was contacted to see if the firm retained a copy of the 1995 Trust. They had none. David Simon could not recall who contacted the law firm, which attorneys were contacted, or even if he or someone on his behalf made the effort to contact the law firm. (*See* Intervenor's Exhibit B, pp. 44:12 – 45:15; 46:22 – 47:15). Perhaps more importantly, he testified that after Simon Bernstein returned from Hopkins & Sutter, he assisted him in preparing documents to be submitted to Lincoln Benefit to give effect to the Trust and that he would have expected Lincoln Benefit to retain copies of the documents. (*See* Intervenor's Exhibit B, pp. 43:10 – 44:2). However, while he again cannot recall who called or to whom they spoke at Lincoln Benefit, that entity retained no copies relevant to the Trust. (*Id.*) This testimony would also allow the jury to question the execution of the trust and the terms it contained.

iv. The terms of Plaintiffs' Exhibits 15 and 16 are inconsistent.

Another issue raising doubt about David Simon's testimony is that Plaintiffs have presented two different versions of the same document which are not fully consistent with each other and not consistent with the Affidavit of David Simon. Plaintiffs' Exhibit 15 seems to be a later version of Plaintiffs' Exhibit 16, the implication being that Plaintiffs' Exhibit 16 was a draft of Plaintiffs' Exhibit 15. Article 11 in both documents addresses the appointment of a successor trustee. David Simon avers at paragraph 25 of his Affidavit that he suggested to Simon Bernstein that Ted be appointed the successor trustee. But the handwriting at BT 000020 (Plaintiffs' Exhibit 16) lists Pam before Ted as a potential successor trustee. More importantly, on Plaintiffs' Exhibit 15 at BT 000010, the typed version of Article 11 indicates David Simon as the successor trustee. Notwithstanding that, the parties have agreed among themselves that the intention all along was for Ted to be the successor trustee. But, when the purported trust first made a claim to the insurance company, they represented that attorney Spallina was the trustee of the Trust. (*See* Intervenor's Exhibit B, pp. 59:13 – 60:3; 81:15 – 82:13) Nothing about the text of either Exhibit, nor any of the other evidence concludes the issue as a matter of law, by the "clear and convincing" standard, that Simon Bernstein executed a trust with the terms contained in those exhibits.

D. A Triable Issue of Fact Remains

At summary judgment, "if fair-minded persons could draw more than one conclusion or inference from the facts, including one unfavorable to the moving party, a triable issue exists and the motion for summary judgment should be denied. It is only when undisputed facts are susceptible of but a single inference that the issue becomes one of law." *Kern's Estate v. Handelsman,* 115 Ill. App.3d 789, 793-94 (1983). The evidence Plaintiffs have presented and

the evidence included in this Response and in Intervenor's Statement of Facts would allow a jury to conclude that it is at least equally likely that Simon Bernstein never executed the 1995 Trust as that he did; it is at least equally likely that the terms of any trust he might have executed are different than the terms contained in Plaintiffs' Exhibits 15 and 16. And in any event, Plaintiffs have not even tried, no less succeeded in demonstrating by the "clear and convincing" standard, that as a matter of law Simon Bernstein executed a trust and that its terms are as found in those Exhibits. The essential testimony underlying their claim is barred by the Dead Man's Act, and even if it were not barred, it is clearly controverted. Summary judgment must be denied.

WHEREFORE, based upon the foregoing, Intervenor prays that Plaintiffs' Motion for Summary Judgment be denied.

Respectfully submitted,

By: */s/ James J. Stamos*
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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2015, this Response to Plaintiffs' Rule 56.1 Statement of Undisputed Material Facts and Statement of Additional Facts pursuant to Rule 56.1(b)(3)(C) was filed electronically using the CM/ECF system and notice will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ James J. Stamos
James J. Stamos